

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NOS. OS 2008-0035 and OS 2008-0036

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY REGINALD D. PERRY
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
PROTECT COLORADO'S FUTURE and TEACHERS COMMITTEE FOR
EXCELLENCE IN EDUCATION.**

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon the complaint of Reginald D. Perry that Teachers Committee for Excellence in Education (Teachers Committee) and Protect Colorado's Future (PCF) violated Secretary of State regulations relating to prohibitions upon issue committee contributions.

The Secretary of State received Perry's complaint against PCF on October 22, 2008, and his complaint against Teachers Committee on October 24, 2008. Pursuant to Colo. Const. art. XXVIII, § 9, the Secretary forwarded the complaints to the Office of Administrative Courts (OAC) on October 23 and October 27, 2008, respectively. Hearings were initially set for November 6 and 7, 2008, but were consolidated at defendants' request because both complaints involved the same set of alleged facts. Hearing upon the consolidated complaints was held November 6, 2008 at the Office of Administrative Courts. Mr. Perry, who was not present, was represented by Robert Corry, Jr., Esq. Mark G. Grueskin, Esq. of Isaacson Rosenbaum P.C. represented defendants PCF and Teachers Committee.

Issues

Teachers Committee is an issue committee organized to "Promote ballot issues in School District 11." PCF is an issue committee organized to "Support initiatives #57; #62; #73; #74; #75; and #76" and to "Oppose amendments 47, 49 and 54." As disclosed in PCF's contribution report filed with the Secretary of State, PCF accepted a contribution from Teachers Committee on October 10, 2008 of \$2,792.40 worth of "literature." The literature at issue involved campaign flyers opposing amendments 47, 49 and 54. Campaign volunteers for Teachers Committee distributed the flyers to voters within School District 11.

Rule 26 of the Colorado Secretary of State regulations forbids issue committees from making contributions to, or accepting contributions from, other issue committees that do not support or oppose issues supported or opposed by the committee making the contribution. Perry alleges that defendants violated this rule when Teachers Committee made an in-kind contribution of literature worth \$2,792.40 to PCF even though the stated purpose of Teachers Committee did not include opposition to

amendments 47, 49 and 54.

Although PCF initially reported the literature distributed by Teachers Committee as a contribution to its anti-47, 49 and 54 campaign, both PCF and Teachers Committee now contend that there was no contribution to PCF because there was no coordination between the committees regarding the production or distribution of the literature. They contend that the initiative to produce and distribute the literature was solely that of Teachers Committee, without any request, input, approval or knowledge of PCF. Defendants argue that to be considered a contribution, the expense incurred to produce the literature had to be coordinated with PCF. In the absence of such coordination, it was not a contribution and therefore no violation of the Secretary of State's rules.

For the reasons explained below, the ALJ agrees with defendants that there was no contribution, and therefore no violation of Rule 2.6 occurred.

Findings of Fact

1. Teachers Committee is an issue committee registered with the Colorado Secretary of State. As stated in its registration, its purpose is to "Promote ballot issues in School District 11." Teacher's Committee is the political arm of the Colorado Springs Education Association (CSEA). School District 11 is a school district within Colorado Springs.

2. PCF is also an issue committee registered with the Colorado Secretary of State. As stated in its registration, its purpose is to "Support initiatives #57; #62; #73; #74; #75; and #76" and to "Oppose amendments 47, 49 and 54."

3. The ballot issues relevant to this case are amendments 47, 49 and 54. They all proposed amendments to the Colorado Constitution. Amendment 47 was a proposal for "Prohibition on Mandatory Labor Union Membership and Dues;" Amendment 49 was a proposal regarding "Allowable Government Paycheck Deductions;" and Amendment 54 was a proposal regarding "Campaign Contributions from Certain Government Contractors."¹

4. In mid-September 2008, the CSEA Board of Directors voted to oppose amendments 47, 49 and 54 as contrary to the interests of its membership in that they would impair CSEA's ability to collect dues, would restrict its members' ability to collectively bargain, and would choke off its membership's political voice. It therefore authorized Teachers Committee to engage in political activity to oppose those amendments.

5. In response, Teachers Committee conceived a political flyer opposing the three amendments and paid \$2,792.40 to a Pueblo printing firm to prepare a large number of the flyers.²

¹ The ALJ takes judicial notice of the titles of these amendments from the 2008 State Ballot Information Booklet (Bluebook) at www.state.co.us/gov_dir/leg_dir/lcsstaff/bluebook/2008Bluebookmainpage.htm.

² The actual printing cost was twice this amount, but only one side of the two-sided flyer dealt with amendments 47, 49 and 54.

6. CSEA teacher volunteers distributed the flyers on October 4 and 18, 2008. Prior to distribution, Teachers Committee provided the volunteers with maps of the area near their schools and instructed the volunteers to deliver the flyers to homes within that area. The intention was to target voters within School District 11.

7. PCF had no role in the CSEA Board of Director's decision to oppose amendments 47, 49 and 54, or in the Teachers Committee effort to print and distribute the flyers. Teachers Committee conceived, caused to be printed, paid for, and distributed the flyers with no input or assistance whatever from PCF. None of the flyers were delivered to PCF.

8. Sometime in early October 2008, Teachers Committee advised PCF that it had expended \$2,792.40 to prepare the flyers opposing amendments 47, 49 and 54. PCF subsequently reported this amount to the Secretary of State as an in-kind contribution of literature from Teachers Committee.

9. On October 22 and 24, 2008, Perry filed his complaints with the Secretary of State alleging that Teachers Committee violated the Secretary of State's rules by contributing literature to oppose an issue not within its stated purpose, and that PCF violated the rules by accepting that contribution.

Discussion and Conclusions of Law

Colorado's Campaign Finance Laws

The primary campaign finance law in Colorado is Article XXVIII of the Colorado Constitution, which was approved by the people of Colorado in 2002. Article XXVIII imposes contribution limits, encourages voluntary spending limits, imposes reporting and disclosure requirements, and vests enforcement authority in the Secretary of State. Colorado also has statutory campaign finance law, known as the Fair Campaign Practices Act (FCPA), §§ 1-45-101 to 118, C.R.S., which was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again substantially revised by initiative in 2002 as the result of the adoption of Article XXVIII. The Secretary of State, pursuant to regulations published at 8 CCR 1505-6, further regulates campaign finance practices.

Limitations on Issue Committee Contributions

Perry contends that Teachers Committee and PCF violated Secretary of State Rule 2.6 by making and accepting a contribution of campaign literature. Rule 2.6 reads as follows:

Issue committees shall not contribute to political parties, political committees or candidate committees. An issue committee shall not contribute to, or accept contributions from, other issue committees that do not support or oppose issues supported or opposed by the issue committee making the contribution. [Article XXVIII, Section 2(10(b))]

Perry argues that because the purpose of Teachers Committee, as shown by its Secretary of State registration, was only to *promote ballot issues in School District 11*, it was not allowed to make a contribution to *oppose amendments 47, 49 and 54*, and PCF was not allowed to accept such a contribution. There is merit in this argument. According to Rule 2.5, issue committees may support or oppose more than one issue, provided the following conditions are met:

the specific issues are included on the committee registration form at such time as an issue meets the provisions of Rule 1.6; no generic phraseology may be used once such an issue is known ... and the registration form states whether the committee will be supporting or opposing said issues.

There is no doubt that pursuant to Rule 1.6, amendments 47, 49 and 54 were “issues” at the time Teachers Committee prepared its campaign literature. Teachers Committee therefore was required by Rule 2.5 to specifically identify those amendments in the purpose statement of its registration if it intended to make contributions opposing those amendments. Furthermore, if contributions were to be made, Teachers Committee was obligated by Rule 2.5 to state whether it was supporting or opposing the amendments. It did not do these things. The generic statement, “promote ballot issues within School District 11” was not a sufficient specification under Rule 2.5 to cover opposition to amendments 47, 49 and 54.³

There Was No Contribution

Defendants nonetheless argue that it made no “contribution” to PCF, and therefore there was no violation of Rule 2.6. The ALJ agrees.

The alleged contribution at issue was the money spent by Teachers Committee to purchase campaign flyers opposing amendments 47, 49 and 54. Because this payment of money was for the purpose of opposing ballot issues, it was an “expenditure” as defined by the Colorado constitution. “Expenditure” means any purchase, payment ... or gift of money for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or question.” Colo. Const. art. XXVIII, § 2(8)(a).

Perry argues that the expenditure was a “contribution” as defined by Colo. Const. art. XXVIII, § 2(5)(a)(II) because it was a “payment made to a third party for the benefit of any ... issue committee.” This definition of contribution, however, has been judicially supplemented to require a showing of “coordination.” That is to say, a payment of money to a third party for the benefit of an issue committee is not a “contribution” to that committee unless the expenditure was coordinated with that committee. *Rutt v. Poudre Education Ass’n*, 151 P.3d 585, 589 (Colo. App. 2006)(“a finding of coordination is

³ A Teachers Committee witness testified that the actual purpose of Teachers Committee was to “promote *our position on* ballot issues within School District 11.” However, even if this had been Teachers Committee’s statement of purpose, Rule 2.5 required more than generic phraseology to oppose specific amendments.

required to avoid a conflict with the First Amendment.”) In announcing this rule, *Rutt* relied upon *Buckley v. Valeo*, 424 U.S. 1 (1976), which held that provisions of the Federal Election Campaign Act of 1971 limiting political expenditures were an unconstitutional infringement upon the First Amendment right of free expression unless the expenditures were coordinated with or controlled by the candidate or committee being supported. *Id.* at 589. Although the Colorado Supreme Court reversed *Rutt* on other grounds in *Colorado Educ. Ass’n v. Rutt*, 184 P.3d 65 (Colo. 2008) (“*Rutt II*”), and did not reach the issue of “coordination,” the Court nonetheless underscored the constitutional protection to be afforded independent expenditures for political speech:

Campaign spending is a form of speech, because “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.” *Buckley v. Valeo*, 424 U.S. 1, 19, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Restrictions on “the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression.” *Id.* Restrictions on expenditures “operate in an area of the most fundamental First Amendment activities” because they amount to a restriction on political speech. *Id.* at 14, 96 S.Ct. 612. Thus, such limitations on expenditures are subject to “the closest scrutiny.” *Id.* at 25, 96 S.Ct. 612 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460-61, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)).

Rutt II, 184 P.3d at 75. It therefore appears that the Court of Appeals holding that “a finding of coordination is required to avoid a conflict with the First Amendment” remains good law in Colorado.

Applying the rule announced by *Rutt*, there has been no contribution because there is no evidence of any coordination between PCF and Teachers Committee regarding the production or distribution of the campaign literature. To the contrary, the undisputed evidence was that Teachers Committee conceived of the plan to produce the literature, arranged and paid for the product, and distributed it to homes within the school district on its own initiative and without any input, control or contact from PCF. The only evidence of any communication between PCF and the Teachers Committee regarding the literature came after the fact when Teachers Committee told PCF what it had done. In the absence of any coordination between the two issue committees, there was no “contribution” prohibited by Rule 2.6. The mere fact that PCF reported the literature as a contribution does not make it so.

The Literature Was Not “For the Benefit” of PCF

Furthermore, in order for the Teacher Committee expenditure to be a contribution to PCF, it had to be “for the benefit” of PCF. Colo. Const. art. XXVIII, § 2(5)(a)(II) (“‘Contribution’ means ... [A]ny payment made to a third party *for the benefit* of any ... issue committee”)(*italics added*). The evidence is convincing that Teacher Committee purchased the campaign literature to promote its own interests, and in particular to preserve the political power and voice of its CSEA membership from what it

saw as infringement by amendments 47, 49 and 54. The fact that its position on these amendments may have been of benefit to PCF was incidental and not Teachers Committee's primary purpose. For this additional reason, the expenditure for literature was not a "contribution" to PCF.

Summary

The expenditure by Teachers Committee to purchase and distribute campaign literature opposing amendments 47, 49 and 54 was not a prohibited contribution to the PCF issue committee, as defined by Rule 2.6, because the expenditure by Teachers Committee was not coordinated with or controlled by PCF and was not for PCF's benefit.

Agency Decision

The Teachers Committee for Excellence in Education and Protect Colorado's Future did not violate Secretary of State Rule 2.6, as alleged, and therefore the complaints are dismissed.

Done and Signed

November 18, 2008

ROBERT N. SPENCER
Administrative Law Judge

Digitally recorded CR #2

Exhibits admitted:

Complainant's exhibits: 1, 2, 3

Defendants' exhibits: none

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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and

William Hobbs
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on this ____ day of November 2008.

Court Clerk